Supreme Court, U.S.
FILED
JUL 30 1992
OFFICE OF THE CLERK

No. 91-2037

In The

Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DONALD J. HANAWAY, Attorney General of the State of Wisconsin; DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

Petitioners,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and the SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT SOKAOGON'S BRIEF IN OPPOSITION TO THE PETITION

MILTON ROSENBERG
Counsel of Record
Attorney for Respondent
Sokaogon Chippewa Community
40 Glenway Street
Madison, Wisconsin 53705
(608) 231-6784

2304
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Is a timely filed post-judgment motion to vacate judgment, filed by an Indian tribe which had sought redress under the Indian Gaming Regulatory Act for a State's refusal to conclude a gaming compact and was seeking to preserve access to specific relief under that statute needed to redress its injury, a substantive motion properly treated as falling under Rule 59(e)?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Statement of the Case 2

Reasons for Denying the Writ 4

I. The Seventh Circuit's decision did not conflict with any other Circuit, but correctly applied its own teachings and those of this court in scrutinizing the intent of the motion to vacate and concluding that it was substantive. 4

II. The underlying issues of this appeal may have been rendered moot by petitioners' actions in voluntarily concluding compacts with Wisconsin tribes on the subjects at issue. 8

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Buchanan v. Stanships, Inc., 485 U.S. 265 (1988) 4, 6

Budinich v. Becton Dickinson Co., 486 U.S. 196 (1988) 6, 7

Contents

Page

Charles v. Daley, 799 F.2d 343 (7th Cir. 1986) 4, 6

Durham v. Kelly, 810 F.2d 1500 (9th Cir. 1989) 6

Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981) 7

Harcon Barge Co. v D&G Rentals, Inc., 784 F.2d 665 (5th Cir. 1986) (en banc), cert. denied, 479 U.S. 930 (1986) 6

Holmes v. J. Ray McDermott & Co., 682 F.2d 1143 (5th Cir. 1982), cert. denied, 459 U.S. 1107 (1983) 7

International Ass'n of Bridge, Structural, Ornamental, and Reinforcing Ironworkers' Local Union 75 v. Madison Industries, Inc., 733 F.2d 656 (9th Cir. 1984) 7

Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir. 1986) 7

Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980)..... 7

Lac du Flambeau Band v. State of Wisconsin, 770 F. Supp. 480 (W.D. Wis. 1991) 2

Lac du Flambeau Band v. State of Wisconsin, 957 F.2d 515 (7th Cir. 1992) 3, 4, 5

Lucas v. Florida Power & Light Co., 729 F.2d 1300 (11th Cir. 1984) 6, 7

Osterneck v. E.T. Barwick Industries, Inc., 825 F.2d 1521 (11th Cir. 1987)..... 7

Contents

Page

Osterneck v. Ernst & Whinny, 489 U.S. 169 (1989) 4, 6, 7

Sutliff v. Donovan Cos., 727 F.2d 648 (7th Cir. 1984) 5

United States v. Ibarra, ____ U.S. ____, 112 S. Ct. 4 (1991) 4

White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982) 6, 7

Statutes Cited:

Wis. Stat. § 14.035..... 8

Indian Gaming Regulatory Act:

25 U.S.C. § 2701 et seq. .....i, 2

25 U.S.C. § 2710(d)..... 2

25 U.S.C. § 2710(d)(7)(B) 2, 7, 11

25 U.S.C. § 2710(d)(7)(B)(iii)..... 2

25 U.S.C. § 2710(d)(7)(B)(iv)..... 2

25 U.S.C. § 2710(d)(7)(B)(vi)..... 2

25 U.S.C. § 2710(d)(8)(A) 3, 9

25 U.S.C. § 2710(d)(8)(D)..... 9

42 U.S.C. § 1988 7

Contents

Page

Rules Cited:

Federal Rule of Appellate Procedure Rule 4(a)(4) 3

Federal Rules of Civil Procedure:

Rule 59 .....3, 5

Rule 59(e) .....i, 3, 4, 6, 7

Other Authorities Cited:

57 F.R. 5350 (February 13, 1992) 9

57 F.R. 3696 (January 30, 1992) 9

57 F.R. 8560-01 (March 10, 1992) 9

57 F.R. 8562 (March 10, 1992) 9

57 F.R. 11548 (April 3, 1992)..... 9

57 F.R. 15000-01 (April 23, 1992) 9

57 F.R. 29406 (July 1, 1992) 9

No. 91-2037

In The

Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DONALD J. HANAWAY, Attorney General of the State of Wisconsin; DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

Petitioners,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and the SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT SOKAOGON'S BRIEF IN OPPOSITION TO THE PETITION

Respondent Sokaogon Chippewa Community joins with respondent Lac du Flambeau Band in respectfully requesting this Court to deny the petition for writ of certiorari requesting review of the March 23, 1992 decision and judgment of the United States Court of Appeals for the Seventh Circuit, which correctly dismissed the petitioners' appeal for lack of jurisdiction.

STATEMENT OF THE CASE

The respondent tribes filed suit in the district court against the state petitioners seeking redress under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*[1], for the petitioner's refusal to conclude a compact on the subject of casino games.[2] Upon denial of the petitioners' motion for summary judgment, and upon the petitioners' stipulation, the district court ordered the parties to conclude a compact on the games at issue within 60 days. *Lac du Flambeau Band v. State of Wisconsin,* 770 F. Supp. 480 (W.D. Wis. 1991) (hereafter "*Flambeau II*") (A49). Shortly thereafter a separate judgment was entered to the same effect (A46).

Under 25 U.S.C. § 2710(d)(7)(B), where a state is found to have refused to negotiate or to have failed to negotiate in good faith, the plaintiff tribes are entitled to a series of remedies leading eventually to a state/tribal compact or its equivalent. Under subsection (B)(iii) the district court may order the State to conclude a compact with the plaintiff within 60 days. But this order does not require the State to consent to a compact. Upon failure of the parties to agree to a compact the Act provides for the court appointment of a mediator, and the selection by the mediator of the "last best offer" compact "which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court." (B)(iv). Unless the State consents to this choice, however, the selection is not binding as a compact, and the mediator is to notify the Secretary of Interior for prescription of regulations consistent with the mediator's selection. (B)(vi).

---

1. Hereafter referred to as "IGRA". All provisions of the Act pertinent here are found in 25 U.S.C. § 2710(d).

2. As used here this term refers to table games, *e.g.*, blackjack, roulette, and poker, and electronic games of chance.

Within 10 days of entry of judgment the respondent Lac du Flambeau Band filed a motion to vacate the judgment (A44). As grounds for the motion Flambeau contended that entry of judgment was premature, since the tribe had not been accorded the full relief it sought under the statute, and the judgment might preclude access to the district court for further relief. This motion was denied by the district court on July 22, 1991.

On July 17, 1991, during the pendency of the motion, petitioners filed a notice of appeal (A12). Following the disposition of the motion no further notice of appeal was filed.

At oral argument on the appeal the Seventh Circuit panel raised the possible lack of appellate jurisdiction under Rule 4(a)(4), F.R.A.P. Under that rule, if any party timely files a post-judgment motion to alter or amend a judgment under Rule 59, Fed. R. Civ. P., any notice of appeal filed during the pendency of the motion is of no effect; a new notice of appeal must be filed after disposition of the motion in order to confer jurisdiction on the Court of Appeals.

After supplemental briefing by the parties the Seventh Circuit dismissed the appeal, holding that the motion to vacate, since it sought the relief of a concluded compact and not mere negotiation, was substantive and therefore fell under Rule 59(e). *Lac du Flambeau Band v. State of Wisconsin,* 957 F.2d 515 (7th Cir. 1992) (hereafter "*Flambeau III*").

Following the district court order and judgment the Governor of Wisconsin voluntarily entered into compacts on the subject of casino games with respondent Sokaogon and five non-party Wisconsin tribes. As detailed more thoroughly in Part II below, these six compacts, together with a mediated compact with respondent Flambeau to which the State consented, have all been approved by the Secretary of Interior pursuant to 25 U.S.C. § 2710(d)(8)(A).

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT'S DECISION DID NOT CONFLICT WITH ANY OTHER CIRCUIT, BUT CORRECTLY APPLIED ITS OWN TEACHINGS AND THOSE OF THIS COURT IN SCRUTINIZING THE INTENT OF THE MOTION TO VACATE AND CONCLUDING THAT IT WAS SUBSTANTIVE.

The alleged conflict between the decision below and the decisions of this Court and other circuits is premised on the contention that the Seventh Circuit "mechanically" applied its bright-line rule to hold that any motion to vacate constitutes a Rule 59(e) motion. That contention is untrue.

First, the bright-line rule employed by the Seventh Circuit incorporates the standards defined by this Court. The bright-line rule itself states "all *substantive* motions served within 10 days of the entry of a judgment will be treated as based on Rule 59." *Flambeau III,* 957 F.2d 515, 517 (7th Cir. 1992) *quoting Charles v. Daley,* 799 F.2d 343, 347 (7th Cir. 1986) (emphasis added). Clearly, in reaching its decision the Seventh Circuit was aware of and applied the distinction between "substantive" motions and motions "seek[ing] a technical or collateral change." *Flambeau III,* 957 F.2d at 516, *citing United States v. Ibarra,* 112 S. Ct. 4 (1991); *Osterneck v. Ernst & Whinny,* 489 U.S. 169 (1989); and *Buchanan v. Stanships, Inc.,* 485 U.S. 265 (1988).

Second, the Seventh Circuit's treatment of "vacation [as] a form of alteration," rather than imposing a mechanical interpretation of the motion, rejected a mechanical separation of motions to vacate from motions to alter or amend, and facilitated analysis of the specific motion. *Flambeau III,* 957 F.2d

at 517, *citing Sutliff v. Donovan Cos.*, 727 F.2d 648, 652 (7th Cir. 1984). Rather than prevent analysis of the underlying issues, the Seventh Circuit's willingness to consider motions to vacate as Rule 59 motions opened the door to that analysis.

Third, the Seventh Circuit carried out the analysis demanded by petitioners, and concluded that the motion, albeit ultimately deemed incorrect, was substantive and not collateral to the tribes' statutory cause of action:

> The tribe made a simple point: it wants a compact with Wisconsin, leading it to submit that judgment directed exclusively to negotiation is premature. Had the court accepted this position, it would have annulled its judgment, leaving nothing from which the State could appeal. Any order issued at the end of negotiations would differ substantively from the judgment the court had entered.

957 F.2d at 517. The Seventh Circuit carefully distinguished its analysis of the motion from an analysis of its correctness:

> The [district] court believed the tribe incorrect, observing that an interlocutory injunction to dicker does not prevent subsequent supplemental relief, such as the appointment of a mediator . . . and review of the mediator's recommendation. Because an estimate of the merit of the motion does not affect its status in suspending the finality of the judgment, *Ibarra*, 112 S. Ct. at 6, the tribes misunderstanding does not assist the State.

957 F.2d at 517.

So far from being inconsistent with this Court's precedents,

the foregoing analysis of the motion in terms of the remedy the respondents sought in the case follows this Court's teachings in *Osterneck, supra,* and *Budinich v. Becton Dickinson Co.*, 486 U.S. 196 (1988):

> We do not believe the result should be different where prejudgment interest is available as a matter of right . . . [M]andatory prejudgment interest, no less than discretionary prejudgment interest, serves to "remedy the injury giving rise to the [underlying] action."

Osterneck, 489 U.S. at 176-77 n.3, *quoting Budinich,* 486 U.S. at 200.

Fourth, and finally, petitioners' allegations of conflict confuse variations in formulae[3] with differences in outcome on specific types of post-judgment motions. Where this Court has granted the writ on Rule 59(e) issues it has done so not to impose a unitary verbal formulation on the circuits, but to resolve real conflicts in outcome concerning the status of generic types of recurring post-judgment motions. *Buchanan v. Stanships, Inc., supra* (motions for costs);[4] *White v. New Hampshire Dept. of*

---

3. This is not to suggest that there are significant differences between the Seventh Circuit's formulation and other circuits. As respondent Flambeau shows in Part I of its Brief in Opposition, the *Charles* formula has been adopted, mentioned with favor, or a close variant followed in virtually every circuit. We fully concur with Flambeau's analysis.

4. *Buchanan*, 485 U.S. at 267, *comparing Harcon Barge Co. v. D & G Rentals, Inc.*, 784 F.2d 665 (5th Cir. 1986) (*en banc*), *cert. denied,* 479 U.S. 930 (1986) (upholding panel decision construing a motion to avoid taxing of costs as a Rule 59(e) motion); *with Durham v. Kelly*, 810 F.2d 1500 (9th Cir. 1989) ("We adopt as the law of this circuit the rule that a motion to alter or amend a judgment to award costs does not come within Rule 59(e)") and *Lucas*

(Cont'd)

Employment Security, 455 U.S. 445 (1982) and *Budinich v. Becton Dickinson Co.*, *supra* (motions for attorney fees);[5] *Osterneck v. Ernst & Whinney*, *supra* (motions for prejudgment interest).[6]

Rather than a conflict in the circuits over the handling of generic types of post-judgment motions, the motion here involved the issue of access to *sui generis* relief provided in 25 U.S.C. § 2710(d)(7)(B). The nature of the specific post-negotiation relief prescribed under that statute had never been judicially interpreted

---

(Cont'd)
v. Florida Power & Light Co., 729 F.2d 1300, 1301 (11th Cir. 1984) ("A motion respecting costs is not a motion to alter or amend a judgment under Rule 59").

5. *White*, 455 U.S. at 450 n.9, citing conflicting attorney fee motion decisions between the Fifth, Sixth and Seventh Circuits on the one hand, and the First and Tenth Circuits on the other; *compare Knighton v. Watkins*, 616 F.2d 795, 797 (5th Cir. 1980) ("It [a motion for attorney fees pursuant to 42 U.S.C. § 1988] is, therefore, not governed by the provisions of Rule 59(e)"); *with Glass v. Pfeffer*, 657 F.2d 252, 255 (10th Cir. 1981) (reaffirming prior decision holding that "the court's judgment was not final for purposes of appeal until the attorneys' fees issue [under § 1988] had been addressed and decided").

Budinich, 486 U.S. at 198, citing as examples the conflicting decisions in *Holmes v. J. Ray McDermott & Co.*, 682 F.2d 1143, 1146 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983) (holding that, for purposes of finality the determination of attorney fees was a "substantive component" in that action and thus an order which left the amount of fees undetermined was not final); and *International Ass'n of Bridge, Structural, Ornamental, and Reinforcing Ironworkers' Local Union 75 v. Madison Industries, Inc.*, 733 F.2d 656, 658 (9th Cir. 1984) (holding "all attorney's fees requests are collateral to the main action").

6. *Osterneck*, 489 U.S. at 172-73, *citing Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521, 1525 (11th Cir. 1987) ("Our conclusion [is] that a motion for prejudgment interest is a Rule 59(e) motion"); and *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 738 (9th Cir. 1986) ("[W]e hold that a post-judgment first-time motion for prejudgment interest is not a Rule 59(e) motion").

prior to the motion in question; and, so far from there being a conflict among the circuits, no other appellate court has ever addressed the status of a post-judgment motion seeking to preserve access to such relief.

This Court grants its writ in the interest of resolving real, not hypothetical, conflicts among the circuits, involving differences in outcome, not mere wording. When account is further taken that the specific relief at issue in the post-judgment motion here arises under IGRA and is limited to litigation between tribal and state governments where "Class III" gaming compacts are at issue, there is no basis for an assumption that the issue here is likely to recur in the circuits, let alone give rise to conflicting decisions.

II.

THE UNDERLYING ISSUES OF THIS APPEAL MAY HAVE BEEN RENDERED MOOT BY PETITIONERS' ACTIONS IN VOLUNTARILY CONCLUDING COMPACTS WITH WISCONSIN TRIBES ON THE SUBJECTS AT ISSUE.

Since the district court decision and judgment the Govenor of Wisconsin, acting pursuant to express authority conferred by the Wisconsin Legislature,[7] has voluntarily entered into compacts on casino gaming with five non-party tribes in Wisconsin, as well as with the respondent Sokaogon. These compacts have all been approved by the Secretary of Interior and published pursuant to

---

7. Section 14.035, Wis. Stats. states:

> Governor may enter into Indian gaming compacts. The governor may, on behalf of this state, enter into any compact that has been negotiated under 25 U.S.C. § 2710(d).

25 U.S.C. § 2710(d)(8)(A) and (D).[8]

These compacts are virtually identical in their text and structure. Two common features are of special importance: (1) Each compact expressly acknowledges the tribe's right to conduct blackjack and two types of electronic games of chance; and (2) No compact predicates the continuance of the compact on the outcome of the *Flambeau* litigation or even mentions such contingency, nor reserves any right in either party to terminate or revise the compact based on such outcome. On the contrary, virtually every compact contains a provision expressly stating that the seven year term of the compact was freely and voluntarily bargained for between the parties, with each party giving up terms

---

8. The operative compacts, with citations and publication dates, include the following:

(Respondent) Sokaogon Chippewa Community, executed August 22, 1991, approved February 6, 1992, 57 F.R. 5350 (February 13, 1992);

Oneida Tribe of Wisconsin, executed November 8, 1991, approved January 24, 1992, 57 F.R. 3696 (January 30, 1992);

Red Cliff Band, executed December 12, 1991, approved March 4, 1992, published 57 F.R. 8560-01 (March 10, 1992);

St. Croix Band, executed December 19, 1991, approved March 4, 1992, 57 F.R. 8562 (March 10, 1992);

Bad River Band, executed December 12, 1991, approved March 30, 1992, 57 F.R. 11548 (April 3, 1992);

Stockbridge-Munsee Community, executed February 13, 1992, approved April 15, 1992, 57 F.R. 15000-01 (April 23, 1992);

A seventh compact, a mediated compact with the respondent Lac du Flambeau Band, is also in full effect, having been consented to by the State, approved on June 23, 1992 and published, 57 F.R. 29406 (July 1, 1992).

it might otherwise have claimed right to.[9]

Respondent Sokaogon submits that the State's voluntary actions in entering into and consenting to casino gaming compacts with several non-party tribes as well as respondents, subsequently approved by the Secretary, have transformed the issues initially posed on the merits of this appeal, have arguably provided an independent ground for respondents' claim that Wisconsin permits such gaming, and have arguably rendered the appeal moot in so far as it affects the present legal relationships of the parties. While the original issues may arise again upon the expiration of the compacts' seven year terms, any disposition on the merits of a reinstated appeal now would appear to be advisory in nature.

---

9. Chapter XXXI, "Parties' Intent and Material Considerations Of This Compact," an identical chapter in the Sokaogon, Red Cliff, Bad River and St. Croix compacts, provides:

> The parties acknowledge that the mutual compromises with respect to the type of games the tribe is authorized to operate during the term of this Compact and with respect to the duration of this Compact were significant material considerations in reaching agreement and are the essence of this Compact.
>
> The parties do hereby acknowledge that this Compact represents a free, voluntary and amicable agreement by the parties as the result of the unlimited right and opportunity of the parties to make any and all demands with respect to their rights and obligations under the Act, and that this Compact constitutes the whole of the parties' agreement.

CONCLUSION

Neither the Seventh Circuit's bright-line rule nor its analysis of the specific motion at issue here are in conflict with decisions in other circuits or with applicable precedents of this Court. No other appellate court has yet to construe the type of post-judgment motion at issue here, and review of such issue at this stage is unlikely to be of general utility. Finally, the arguable mootness of the underlying appeal issues should militate against a grant of the writ in these circumstances.

For these reasons and the reasons being advanced in respondent Flambeau's Brief in Opposition, respondent Sokaogon Chippewa Community respectfully submits that the grant of the writ is not appropriate here and asks that the petition for the writ of certiorari be denied.

Respectfully submitted,

MILTON ROSENBERG
Counsel of Record
Attorney for Respondent
Sokaogon Chippewa Community